Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term, 1995

Lewis H. DeVault
v.
Erma Nell DeVault

Petition for Writ of Certiorari to the
Court of Appeals of Ohio
Tenth Appellate District

PETITION FOR WRIT OF CERTIORARI

Lewis H. DeVault
6244 London-Groveport Rd.
Grove City OH 43123
614/877-3739

QUESTIONS PRESENTED FOR REVIEW

1. May a referee or Appellate Court retroactively apply a new rule to control the enforceability of an antenuptial agreement which was written at a time when the Courts were reluctant to enforce such agreements if they contained the very language required by this new rule (i.e. language which could be interpreted as encouraging divorce)?

2. May a trial court Judge consider (or reconsider) all matters and facts presented in the record before him at any time during the proceedings to formulate his decision?

3. May a County Court of Appeals refuse to Certify to the State Supreme Court that their decision is in conflict with that of another Appellate Court if the actual case was cited in its decision?

4. Upon remand, may a trial court ignore an Appellate Court's directive to allow setoff's when formulating an award?

5. May an Appellate Court abandon a specific directive to the lower court by its prior decision and deny a hearing that would resolve the issue?

6. Does the Appellate Court have an obligation to permit both parties an opportunity to exhaust their appeal rights and encourage due process without regard to the number of times a single case may come into its jurisdiction?

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PETITION FOR WRIT OF CERTIORARI

Lewis H. DeVault petitions for a Writ Certiorari after The Supreme Court of Ohio denied initial motion to hear ERMA NELL DEVAULT, Appellee v. LEWIS H. DEVAULT, Appellant, Case No. 94-2432 and also subsequently denied motion for reconsideration to hear the case, dated April 12, 1995.

OPINION BELOW

The opinion of The Court of Appeals of Ohio, Tenth Appellate District, DeVault v. DeVault, Nos. 93APF11-1606 and 93APF02-270, dated August 30, 1994, is reported. A copy of the opinion is appended to this petition.

JURISDICTION

The opinion of the Court of Appeals was filed. This case arose from DeVault v. DeVault, Case No. 88DR-11-3301. Petitioner invokes the jurisdiction conferred on this court in accordance with Rules of the Supreme Court of the United States, Part III, Rule 10.1(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supreme Court of Ohio's decision in Fletcher v. Fletcher and the Court of Appeals, Seneca County, Ohio, Third Appellate District's decision in Nighswander v. Nighswander, Case No. 13-87-2, conflict with the Court of Appeals of Ohio, Tenth Appellate District's decision in DeVault v. DeVault, No. 91AP-1089. Thus, two decisions in separate Appellate Districts conflict; and conflict exists between the Supreme Court of Ohio and its lower court.

STATEMENT OF THE CASE

An antenuptial agreement is and has been recognized in the State of Ohio for a considerable length of time; and has changed throughout the years. These changes were based on the trends of a changing Society and determined by Ohio State Supreme Court. Until Gross vs. Gross (1984), Laws in the State of Ohio did not provide a basis for the Courts to enforce an antenuptial agreement containing language which could be interpreted as encouraging divorce. Also, the Courts were reluctant to enforce antenuptial agreements when the spouse causing the breakup of the marriage sought to enforce the agreement and conversely permitted such an agreement to be enforced by a spouse who was the victim via a breach of the marital relationship. Further these agreements were applied in circumstances involving marriages terminated by dissolution or by the living separate and apart provision of the divorce statute. In the instant case, Lewis H. DeVault retained counsel in 1974 to prepare an antenuptial agreement using language taken word-for-word from a reference law book to ensure that the agreement would be enforceable with respect the existing statutes in 1974 for an impending marriage with Erma Nell Rankin. Let it be noted that Erma Nell Rankin also retained separate counsel and conferred with him in her behalf for a considerable length of time before the couple, Lewis H. DeVault and Erma Nell Rankin, signed the agreement in the office of counsel for Erma Nell Rankin which was witnessed by office staff for counsel representing Erma Nell Rankin.

After Gross vs. Gross (1984), The Ohio Supreme Court established the 3-prong test. In DeVault vs. DeVault, Case No. 88DR-11-3301, the referee's report stated: "The referee finds that the three-prong test set forth in Gross has been met and the antenuptial agreement entered into by the parties is valid." But the referee found that "the antenuptial agreement executed by the parties is not enforceable in this divorce." and further stated, "the agreement contains no provision for the contingency of divorce..." in remarks supporting his decision.

Note: The DeVault Antenuptial Agreement was written in 1974. The Gross decision was made in 1984 and the Ohio Supreme Court set forth the 3-part test for these agreements. Therefore, prior to 1984, Antenuptial Agreements specifically providing for event of divorce could be construed to run contrary to public policy and risk the validity of the contract.

Further, at least one other referee and Appellate District Court (Seneca County, Ohio, Third Appellate District) upheld the application of an Antenuptial Agreement in Nighswander v. Nighswander (Jan. 22, 1990), Seneca County App. No. 13-87-2, unreported. The Nighswander Antenuptial Agreement was written in 1965, prior to the Gross Decision and likewise omitted language providing for the event of divorce. And yet again, The Ohio Supreme Court upheld the validity of such a contract which never specifically mentioned divorce in the language of the antenuptial agreement itself [Fletcher v. Fletcher (1994), 99 Ohio St. 3d]. In this case, DeVault vs. DeVault, I and II, the antenuptial agreement

was ruled to be valid by the Gross test but not enforceable in a divorce situation. Since The Ohio Supreme Court has held an antenuptial agreement in which the contract does not specifically mention divorce is enforceable in a divorce (Fletcher vs. Fletcher). It is noteworthy that in DeVault vs. DeVault, the trial court initially accepted the referee's ruling that the agreement did not specifically address divorce and was not enforceable for that reason only. However, upon remand from the Appellate Court wherein the trial court was instructed to make specific findings of fact and conclusions of law, the trial court said,."The Antenuptial Agreement does not specifically contemplate a divorce and therefore clearly did not encourage divorce and it enabled a marriage to occur which probably would not have otherwise occurred." Additionally, the trial court said, "...their intent appears clear however from the sixth and seventh 'whereas' preambles to their Agreement and from paragraphs 1 and 5 of the formal Agreement that not only was their separate property independent from one another for all purposes, but also income or profits therefrom"; and he stated in his decision, "Had the parties wished to exclude the contingency of divorce from the disposition of their respective separate property and income therefrom, they could have specifically done so, but instead chose to be silent as to such an offensive word (divorce) and let the general terms of the Agreement spell out their intent." and finally, the trial court said, "Accordingly, this Court holds, as was the basis for the original Decision, that the Antenuptial Agreement is binding upon the parties and should be considered as their valid contract limiting this Court's disposition upon the

granting of a divorce." (Note: initially the trial court Judge had no record of the referee's report to review, but in his above findings of fact and conclusion of law, he incorporated the agreement citing that, "The record is replete with instances wherein the parties manifested their intent to keep their respective separate property, and profits and income therefrom, as their continuing separate property free from any invasion by the other.")

Upon Plaintiff Appellee's second appeal to the Appellate Court, her counsel appealed the trial court's decision and assigned that the lower court erred in reversing its own finding that the antenuptial agreement was testamentary in nature, not that it did not meet the Gross test. The Appellate Court sustained this assignment of error and recognized that in ruling that antenuptial agreements that fail to mention divorce do not thereby apply to such, ran contrary to the ruling in Nighswander v. Nighswander (Jan. 22, 1990), Seneca County App. No. 13-87-2, unreported. (Note upon motion to certify to Supreme Court, the Appellate Court denied same motion). Again, the referee, the trial court, counsel for Plaintiff Appellee, and the Appellate Court are satisfied that the antenuptial agreement satisfied the requirements of the Gross test. Thus, the issue was clearly that the agreement's language did not specifically address divorce. Upon appeal by the Plaintiff, Erma Nell DeVault, DeVault v. DeVault II, Franklin County App. No. 91-AP-1089, the court (J. Deshler, McCormac and Bowman, JJ), May 28, 1992, ruled that the antenuptial agreement was not enforceable in this divorce.

Without the enforceability of an antenuptial agreement (contract), division of property must be decided by existing law. Since Ohio is not a community property State, husband or wife has the right to own property as though they were not married. Any property bought into the marriage is deemed a non-marital asset and upon termination of the marriage the original owner has the right to that non-marital property belonging to him or her. Also, when a division of property is necessary, the Court should consider economic misconduct when one party systematically transfers or gifting assets after the breakdown of the marriage to ensure those assets are not considered in any property settlement as the wife, Erma Nell DeVault, has done in this situation (by her own testimony). Note that the Appellate Court's decision (DeVault vs.DeVault, No. 93AP-720, dated September 23, 1993), ruled only "the increased value of the trailer park. over and above natural appreciation, must be treated as a marital asset. This, however, does not deprive the trial court from reconsidering on remand all property issues. This includes allowing setoffs against property appellant has transferred out to her son or daughter." Upon remand, the trial court stated "sufficient facts are not available to the Court to proceed as the appellate court might have envisioned in order to accomplish this. However, in a similar manner, and to accomplish the desired equity, this Court will proceed to adjust the distribution of marital property between the parties in order to take into account plaintiff's transfer of her family's business interests to her children." However, the trial court considered only Plaintiff Appellee's interest in one family ice cream company which

represented only one business and did not consider any interest she held in land contracts, a family floral business, two (2) Certificates of Deposit, 140 shares of Merrit Food Stock, cash gifts to children, the Crandon Street property in Hilliard Ohio, several properties which were improved, leased, and sold during the marriage...including commercial properties which were acquired for operating the family businesses and an additional car wash business (all listed in the record). The trial court's decision was appealed for the fourth time, but the first appeal initiated by Lewis H. DeVault (Defendant Appellant) to the Franklin County Court of Appeals. During the court's proceeding, Judge Riley asked, in view of all the instructions that the Appellate Court had already issued each time it has remanded this case back to the trial court, what if anything could the Appellate Court further tell or instruct the trial court to do at this point? (Note that while Judge Riley was smiling as he posed this question to counsel for the Defendant Appellant, he had actually posed a serious question and waited for the answer to his question). Counsel for Lewis H. DeVault (Defendant Appellant) readily, emphatically, and without hesitation asked that the Appellate Court, minimally, instruct the trial court to hold a hearing to determine the value of the Plaintiff 's (Appellee's) assets since the trial court Judge himself stated in his decision that he did not have sufficient facts available to proceed as instructed in the Opinion rendered by the Appellate Court (No. 93AP-720), dated September 23, 1993.

The Appellate Court did not provide for such a hearing. Instead the Franklin County Court of Appeals affirmed the modified trial court's decision on August 30, 1994 and judgment was entered on same day.

REASONS FOR GRANTING THE WRIT

I.

MAY A REFEREE OR APPELLATE COURT RETROACTIVELY APPLY A NEW RULE TO CONTROL THE ENFORCEABILITY OF AN ANTENUPTIAL AGREEMENT WHICH WAS WRITTEN AT A TIME WHEN THE COURTS WERE RELUCTANT TO ENFORCE SUCH AGREEMENTS IF THEY CONTAINED THE VERY LANGUAGE PERMITTED BY THIS NEW RULE (I.E. LANGUAGE WHICH COULD BE INTERPRETED AS ENCOURAGING DIVORCE)?

Prior to Gross v. Gross (1984), language contained in antenuptial agreements specifically addressed death which is certain, but avoided specific language providing for property distribution in the event of divorce which could be construed to encourage divorce which was contrary to public policy. As a result of Gross, the Ohio Supreme Court developed a 3-part test for enforceability and acknowledged that these agreements tend to promote marriage rather than encourage divorce.

The Ohio Supreme Court ruled on the antenuptial agreement in Fletcher v. Fletcher that while "The contract never specifically

mentioned divorce... evidence is sufficient for the trial court to conclude that the parties intended the agreement to apply to a divorce." Further, another Court of Appeals, Seneca County, Ohio, Third Appellate District, ruled on the same issue involving the language of an antenuptial agreement omitting the word "divorce". In that decision, Nighswander v. Nighswander, that Court of Appeals overruled the first assignment of error stating:

> "In support of her first assignment of error, appellant asserts that the antenuptial agreement does not mention the word divorce and does not attempt to define the rights of the parties in the event of divorce. Therefore, appellant argues, the agreement can have no application in the event of a divorce between the parties. We disagree.
>
> The antenuptial agreement provides in part as follows:
>
> **"1. That the said parties and each of them the said Gerald Nighswander and Anita Flicker, hereby declare it to be his and her desire that during their marriage each of them shall and shall continue to be completely independent of the other as to the respect of the enjoyment, disposal, encumbrance or disposition of all property whether owned by either of them at the commencement of their marriage or coming to them or any of them as an accrual of property now owned by them during said marriage, and each of them hereby agrees with the other in full of [sic] and in consideration of said proposed marriage that so far as is**

legally possible by their agreements and the provisions of this contract, all property belonging to either of them acquired prior to their marriage or acquired as a direct result of accumulation acquired from said property during said marriage or property acquired after said marriage as a result of property sold and reinvested, shall be enjoyed by either of said parties owning the same and shall be subject to his or her disposition as his or her separate property in the same manner as if the same proposed marriage had not taken place, and as if said parties both had continued to remain single."

We find this provision to be a clear and straightforward statement of the intention of the parties. We find no reason that this contract should not be enforced just because the parties decide to part company through divorce rather than death. The mere fact that the agreement does not deal with every question which would be presented in the event of a divorce does not mean that the binding provisions of the agreement, to the extent they apply, should not be enforced in the event of a divorce."

Yet, in DeVault v. DeVault, the referee found the agreement, written in 1974, unenforceable precisely because the agreement contained no provisions in the event of divorce. Further, the appellate Court defeated application of the agreement to divorce because it did not specifically address its application to a divorce

(No. 91AP-1089). The courts in DeVault v. DeVault have applied the 3-part test of Gross and found the Antenuptial Agreement to be valid, yet these same courts insist the language must specifically address the event of divorce and ignore the language in the agreement which expresses the parties clear intent that "all properties of any kind, nature or description, real, personal or mixed, wherever the same may be located and whenever or however acquired, which belong to either party, shall be and forever remain the personal estate of said party, free and clear of any right, title or interest by the other party, including all interest, rents and profits which may accrue therefrom." What period of time is covered by "forever"...before and after death...divorce? How much property, assets, income, interest, title, right, is "all". It is unfair for the courts to apply a standard that has become acceptable only since the Gross Decision in 1984 which set the precedent for these agreements to specifically address divorce and ignore the prior climate that existed in 1974 when this agreement was written.

Further, these conflicting decisions threaten to jeopardize an area of law that cannot function properly without unity.

Obviously, the issues presented before this Court involve matters of great general and public interest since Antenuptial Agreements and other contracts are increasingly becoming more and more popular in light of the increased number of divorces, in Ohio and throughout the United States, not to mention unmarried partners living together.

II.

MAY A TRIAL COURT JUDGE CONSIDER (OR RECONSIDER) ALL MATTERS AND FACTS PRESENTED IN THE RECORD BEFORE HIM AT ANY TIME DURING THE PROCEEDINGS TO FORMULATE HIS DECISION?

The second conflict presented in this appeal involves whether a trial court Judge may consider all matters and facts presented in the record before him at any time to formulate his decision as the Judge did in this case. Upon remand from the Appellate Court, the trial court judge held that the Antenuptial Agreement was binding and controlled the distribution of property.

Again, the Appellate Court's decision (91AP-1089), stated the agreement did not apply (as stated above).

III.

MAY A COUNTY COURT OF APPEALS REFUSE TO CERTIFY TO THE SUPREME COURT OF OHIO THAT THEIR DECISION IS IN CONFLICT WITH THAT OF ANOTHER APPELLATE COURT WHEN THE ACTUAL CASE IS CITED WITHIN THEIR WRITTEN DECISION?

The Court of Appeals of Ohio, Tenth Appellate District, denied motion to certify. That same court issued its opinion on May 28, 1992, relative to DeVault v. DeVault, No. 91AP-1089, which stated... "We are aware that our ruling that antenuptial agreements which fail to mention divorce do not thereby apply to such, runs contrary to the ruling in Nighswander v. Nighswander (Jan. 22, 1990), Seneca County App. No. 13-87-2, unreported.

IV.

UPON REMAND, MAY A TRIAL COURT IGNORE AN APPELLATE COURT'S DIRECTIVE TO ALLOW SETOFF'S FOR ASSETS TRANSFERRED OR GIFTED WHEN FORMULATING AN AWARD?

The fourth issue presented in this appeal involves the fair and equitable distribution of assets when the trial court cannot enforce a contractual agreement and lacks sufficient facts to satisfy the appellate court's instructions regarding distribution of property and allowable setoff's for transferred or gifted assets upon remand.

While the record lists assets, with and without values, the trail court evaluated only one asset to allow a setoff, simply dismissing other known assets and stated sufficient facts were not available.

V.

MAY AN APPELLATE COURT ABANDON A SPECIFIC DIRECTIVE TO THE LOWER COURT BY ITS PRIOR DECISION BY DENYING A HEARING THAT WOULD RESOLVE THE ISSUE?

Upon request, the Appellate Court denied a hearing to determine values of assets and adopted the trial court's findings that sufficient facts were not available, not because the assets were not part of the record or did not exist.

VI.

DOES THE APPELLATE COURT HAVE AN OBLIGATION TO PERMIT BOTH PARTIES AN OPPORTUNITY TO EXHAUST THEIR APPEAL RIGHTS WITHOUT REGARD TO THE NUMBER OF TIMES A SINGLE CASE MAY COME INTO ITS JURISDICTION AND NOT TO DISCOURAGE ANYONE FROM EXERCISING THEIR APPEAL RIGHTS, OR CURTAIL HIS DUE PROCESS?

The sixth issue pertains to the Appellate Court's obligation to permit both parties the opportunity to exhaust their appeal rights without regard to the number of times a single case may come into its jurisdiction through the appeal process. While the Court may loose patience or become frustrated with a trial court in view of the number of times it has remanded a case back, the appellant should not suffer, be discouraged from exercising his appeal rights, or in anyway be denied his due process.

CONCLUSION

Petitioner requests that the Court grant its petition for a writ of certiorari and that it rule that the Antenuptial Agreement apply and control the property distribution or minimally order a hearing to determine values not assigned to assets, including any assets transferred out or gifted away so that the setoffs may be allowed as ordered by the Court of Appeals of Ohio, Tenth Appellate District, per Case No. 93AP-720, dated September 23, 1993.

Respectfully submitted,

Lewis H. DeVault
Petitioner

App. 1

ANTENUPTIAL AGREEMENT

THIS agreement, made and entered into at Columbus, Ohio, this 8th day of November, 1974, by and between Lewis DeVault, and Erma Nell Rankin, both of Franklin County, Ohio,

WITNESSETH:

WHEREAS, the parties hereto contemplate marriage with each other;

and

WHEREAS, each of the parties hereto is fully advised and informed by the other party hereto of the nature, extent and value of the property, estate and assets of the other, as disclosed by the itemization hereto attached and made a part hereof; and

WHEREAS, Erma Nell Rankin is fully aware that in the absence of this agreement she would have the right to exempt property, a year's allowance, the use of the mansion house for one year and the to an undivided one-third (1/3) interest in Lewis DeVault's net probate estate; and

WHEREAS, Lewis DeVault is fully aware that in the absence of this agreement he would have the right to exempt property, the use of the mansion house for one year and an undivided one-third (1/3) interest in Erma Nell Rankin's net probate estate; and

WHEREAS, each of the parties hereto is represented herein by independent counsel of their own choosing; and

WHEREAS, Erma Nell Rankin and Lewis DeVault each have children by previous marriages, and it being the manifest interest of the parties hereto to keep their estates separate for the benefit

of the aforesaid heirs and relatives of each of the parties hereto; and

WHEREAS, the parties have mutually agreed that neither shall have any right, claim or interest in or to the property of the other, except as hereinafter specifically set forth

NOW THEREFORE, it is mutually agreed as follows:

1. That all properties of any kind, nature or description, real, personal or mixed, wherever the same may be located and whenever or however acquired, which belong to either party, shall be and forever remain the personal estate of said party, free and clear of any right, title or interest by the other party, including all interest, rents and profits which may accrue therefrom.

2. Upon the prior death of either Erma Nell Rankin or Lewis DeVault, the survivor thereof agrees that he or she shall have no interest in the property or the estate of the decedent, by way of intestate succession or statutory rights, including but not limited to a right of exempt property, a year's allowance and the use of the mansion house for one year

3. Each party hereby waives any right which he or she might have to administer the estate of the other party upon the death of such party.

4. Each party agrees to execute and acknowledge, upon request of the other, any and all instruments of release or conveyance to enable the other party to dispose of any and all real property now owned or hereafter acquired, free and clear from any apparent right of inchoate dower therein.

5. Notwithstanding the terms of the preceding paragraphs to this agreement, noting herein shall preclude either party from making gifts during his or her lifetime to the other, or including such other spouse as a beneficiary or executor under his or her Last Will and Testament.

6. This agreement shall become effective only upon the consummation of the contemplated marriage between the parties hereto, and if such marriage does not take place this agreement shall be null and void.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate on the day and year first above written.

Signed and acknowledged in
the presence of:

"s/William F. Brown" "s/Lewis DeVault"

"s/Marilyn L. Wilson" "s/Erma Nell Rankin"

STATE OF OHIO
COUNTY OF FRANKLIN, ss:

Before me, a notary public in and for said County, personally appeared the above named Lewis DeVault and Erma Nell Rankin, who acknowledged that they did sign the foregoing instrument, and that the same is their free act and deed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Columbus, Ohio, on the date and year first above written.

"s/William F. Brown, Attorney"
William F. Brown, Attorney-At-Law
Notary public--State of Ohio
My Commission has no expiration date.
Section 147.03 R.C.

ITEMIZATION OF ASSETS OWNED BY LEWIS DEVAULT AND ERMA NELL RANKIN, IN CONJUNCTION WITH ANTENUPTIAL CONTRACT BETWEEN THE PARTIES DATED NOVEMBER 8, 1974

Erma Nell Rankin		
1378 Noe Bixby Road	$60,000	
Household effects	20,000	
Merritt Food stock	25,000	
Stock in Diamond "R" Ice Cream Corp. and Sons Wholesale, Inc.	50,000	
	$155,000	
Less liabilities		
Contract obligation to Mrs. Clarson	39,000	
TOTAL		$116,000
Lewis DeVault		
34+ acre tract of land in Pleasant Township, Franklin County, Ohio zoned for trailer court, with 46 fully developed patios and heredi-taments	$326.000	
Mortgage due	126,000	
		$200,000
Land Contract balance due	9,500	
Balance due on mortgage	2,600	6,900
TOTAL		$206,900

The Supreme Court of Ohio

1995 TERM

To wit: March 1, 1995

Erma Nel DeVault,

Appellee,

Case No. 94-2432

v.

ENTRY

Lewis H. DeVault,

Appellant.

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

COSTS:

Docket Fee, $40.00, paid by Ralph S. Silvestri, Jr.

(Franklin County Court of Appeals; Nos. 93APF111606 & 94APF02270)

"s/Thomas J. Moyer"

THOMAS J. MOYER

Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Erma Nel DeVault,

Plaintiff-Appellee,

Cross-Appellant,

v.

Lewis H. DeVault,

Defendant-Appellant

Nos. 93APF11-1606

and

93APF02-270

(REGULAR CALENDAR)

OPINION

Rendered on August 30, 1994

Vincent A. Dugan, Jr., for appellant.

Brandt & Hull, and Michael T. Brandt, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations

REILLY, J.

Lewis H. DeVault appeals and Erma N. DeVault cross-appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, wherein the trial court found the increased value of a mobile home park was a marital asset, and Ms. DeVault's share of such was $150,000. This is the fourth time the matter has been before this court. The trial court had

previously granted the divorce and awarded the parties the property titled in their respective names. Ms. DeVault appealed to this court and we remanded the case for findings of fact and conclusions of law. Upon the trial court's decision on remand, Ms. DeVault again appealed to this court. We remanded the action to the trial court once again, where the trial court found only one marital asset, three hundred twenty-five shares of stock.

For the third time, Ms. DeVault appealed to this court, arguing that the trial court erred in not determining that the mobile home park was a marital asset and in not awarding her sustenance spousal support. In our decision, DeVault v. DeVault (Sept. 23, 1993), Franklin App. No. 93AP-720, unreported (1993 Opinions 4023, 4027), we held that the increased value of the mobile home park, over and above normal and natural appreciation, must be treated as a marital asset. In that opinion, we also stated:

> "*** This, however, does not deprive the trial court from reconsidering on remand all property issues. This includes allowing setoffs against property appellant has transferred out to her son and daughter.***" Id.

Upon remand, the trial court found the increased value of the mobile home park was a marital asset, in accordance with our opinion. The trial court found that the fair market value of the of the mobile home park was $803,000 at the time of the divorce, minus a mortgage balance of $55,000, for a net equity of $748,000. The net equity in the mobile home park at the time of

the marriage was $73,400. Adjusting the figures to allow for appreciation, the trial court found that the increased value in the mobile home park during the marriage was $388,600. The trial court deducted from this amount $29,110 which represented the value of a double-wide mobile home which the trial court previously found to be Ms. DeVault's separate property and which the trial court then found to be marital property. Taking into account the dicta from our recent opinion regarding setoffs against property Ms. DeVault had transferred to her children, the trial court divided the final figure of $359,490 based on the relative share of business interests brought into the marriage by each party. Ms. DeVault had a twenty-five percent interest, worth $50,000, in her family's business. During the marriage to Mr. DeVault, she transferred this interest to her children. Because Ms. DeVault brought $50,000 of a total of $120,000, the trial court found her share of the $359,490 was $150,000. Mr. DeVault brought $70,000 out of a total of $120,000 in business interests into the marriage and , thus, his share of the increased value of the mobile home park was $210,000. Mr. DeVault has appealed the trial court's judgment, assigning two errors for our consideration:

> "ASSIGNMENT OF ERROR #1
>
> "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN NOT CONDUCTING A HEARING AND IN NOT

PROPERLY APPORTIONING THE ASSETS OF THE PARTIES.

"ASSIGNMENT OF ERROR #2

"THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN FAILING TO FIND VALUES OF ALL ASSETS INCLUDING THREE (3) MOBILE HOMES IN ITS DIVISION OF PROPERTY."

Ms. DeVault has cross-appealed, assigning three errors for our consideration:

"1. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW IN GRANTING THE DEFENDANT-CROSS-APPELLEE AN EQUITABLE SET OFF AGAINST THE PLAINTIFF-APPELLANT'S SEPARATE NON-MARITAL PROPERTY WHICH HAD BEEN GIFTED TO HER CHILDREN AT THE BEHEST OF DEFENDANT-CROSS-APPELLEE THREE (3) YEARS PRIOR TO THE DIVORCE.

"2. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED AS A MATTER OF LAW BY FAILING

TO CONSIDER THE VALUE OF THE THREE (3) MOBILE HOMES IN ITS DIVISION OF PROPERTY.

"3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT THE PLAINTIFF-CROSS-APPELLANT ATTORNEY FEES OR GRANT HER A HEARING ON THIS MATTER."

The case number for this appeal is designated as 93APF11-1606.

After Ms. DeVault appealed the judgment of the trial court, she filed a motion for attorney fees. The trial court held a hearing on the matter on January 25, 1994. On February 1, 1994, the trial court filed a judgment entry, granting Mss. DeVault (hereinafter "appellee:) post-decree attorney fees in the amount of $2,500. Mr. DeVault (hereinafter "appellant") has appealed in case No. 94APF02-270, assigning one error for our consideration:

"ASSIGNMENT OF ERROR

"1. THE TRIAL COURT ABUSED ITS DISCRETION AND DID NOT FOLLOW THE LAW IN GRANTING ATTORNEY FEES TO THE PLAINTIFF-APPELLEE, AS THE AWARD WAS NOT SUPPORTED BY THE EVIDENCE."

The two appeals and cross-appeal have been consolidated.

In case No. 93APF11-1606, appellant's first and second assignments of error and Appellee's second cross-assignment of error are interrelated and will therefore be addressed together. Both appellant and appellee set forth various arguments regarding the trial court's distribution and/or determination of marital property. Appellant contends that there was evidence before the trial court that the mobile home park was worth $586,000, as opposed to the $803,000 value found by the trial court. Appellant further argues that the trial court failed to take into account appellee's assets other than the stock in her family business, including cash, a Cadillac, a land contract, a savings account, jewelry and other stock. Appellant also contends that there was no evidence that the three mobile homes the trial court included in the value of the mobile home park even existed. Appellant argues that an additional hearing should have been held in order to make a proper determination on division of property. Appellee, on the other hand, argues that the trial court failed to properly consider the value of the three mobile homes.

With regard to each of these arguments, we hold that the trial court had sufficient evidence before it which supports the trial court's judgment. No additional hearing was needed. This is the fourth time this court and the trial court have reviewed and decided various division of property issues and we find no abuse of discretion pertaining to the above argument's. Therefore, appellant's first and second assignments of error in case No.

93APF11-1606 are overruled. Appellee's second cross-assignment of error in case No. 93APF11-1606 is also overruled.

In her first cross-assignment of error in case No 93APF11-1606, appellee contends that the trial court erred in allowing a setoff against her separate, non marital property which she transferred to her children three years prior to the divorce. In addition to her argument that the setoff was improper, appellee contends that in determining the increased value of the mobile home park, the trial court made a mathematical error. Appellee contends that the mortgage balance on the mobile home park at the time of the divorce was actually $40,000 and not $55,000, as the trial court stated. We agree and therefore modify the final figure reached by the trial court. The increased value of the mobile home park during the marriage was actually $403,600 and not $338,600. The final figure, therefore, is $374,490. To this extent, therefore, Appellee's first cross-assignment of error is sustained. However, the trial court did not abuse its discretion in granting a setoff against property appellee transferred to her children.

As stated above, the trial court, in order to take into account appellee's transfer of stock in her family's business to her children, divided the figure representing the increased value of the mobile home park by giving 50,000/120,000 of that amount to appellee and 70,000/120,000 to appellant. R.C. 3105.171(C)(1) states, in pertinent part:

"Except as provided in this division or division (E) of this section, the division of marital property shall be equal. If an equal division marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section." (Emphasis added.)

Division (F) of R.C. 3105.171 states:

"In making a division of marital property and in determining whether to make and the amount of any distributive award under this section, the court shall consider all of the following factors:

"(1) The duration of the marriage;

"(2) The assets and liabilities of the spouses.

"(3) The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage.

"(4) The liquidity of the property to be distributed;

"(5) The economic desirability of retraining intact on asset or an interest in an asset;

"(6) The tax consequences of the property division upon the respective awards to be made to each spouse;

"(7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;

"(8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;

"(9) Any other factor that the court expressly finds to be relevant and equitable." (Emphasis added.)

A further relevant provision of R.C. 3105.171 states:

"(E)(3) If a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property."

Here, the trial court stated that it so divided the marital property in order to accomplish equity. Although there was no evidence of financial misconduct on the part of the appellee in transferring the stock to her children, R.C. 3105.17(F)(9) allows the trial court to distribute marital property in order to do equity. We can find no abuse of discretion in the trial court allocating the marital asset in such a manner and for such a reason. The division of the increased value of assets brought to the marriage is on the proportion of the value that each party brought. The decision of the trial court is not unreasonable even if we would find a different division to be reasonable. Therefore, appellee's second assignment of error is sustained in part as to the mathematical error and overruled in part as to the division of the increased value in the mobile home park.

Accordingly, the trial court's judgment is affirmed but with the following modification. The increased value of the mobile home park during the marriage is $374,490, divided in accordance with the trial court's formula.

Appellee's third cross-assignment of error in case No.93APF11-1606 and appellant's sole assignment of error in case No. 94APF02-270 each address the issue of attorney fees and will, therefore, be addressed together. In her third cross-assignment of error, appellee contends that the trial court abused its discretion in not granting her attorney fees or a hearing on the matter. Appellee does not state at which point in the various

proceedings the trial court erred in not awarding her attorney fees or a hearing on the matter. However, we conclude that such denial, no mater where in the proceeding's it occurred, was not an abuse Of discretion. The trial court had sufficient evidence regarding the financial situation of each party to make an informed and proper decision.

Appellant, in appeal No. 94APF02-2270 contends that the trial court abused its discretion in awarding appellee attorney fees in a judgment entry dated February 1, 1994. On December 14, 1993, appellee filed a motion requesting post-decree attorney fees. This was after the parties appealed the trial court's division of property decision. The trial court awarded appellee $2,500 in attorney fee's..

While a hearing was held on the motion, no transcript was made of that hearing. We will therefore presume regularity within that proceeding. We can, therefore, find no abuse of discretion in the trial court awarding such fees. Accordingly, appellee's third cross-assignment of error is overruled and appellant's sole assignment of error in Case No. 94AFP02-270 is also overruled.

In Summary, appellant's first and second assignments of error and appellee's second cross-assignment of error in case No. 93APF11-1606 are overruled. Appellee's first cross-assignment of error in 93APF11-1606 is sustained in part and overruled in part, and the following modification is made to the trial court's judgment: The increased value of the mobile home park is $374,490, which is to be divided in accordance with the trial court's formula. Appellee's third cross-assignment of error in case No. 93APF11-

1606 is overruled and appellant's sole assignment of error in case No. 94APF02-270 is overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relation's, as modified hereby is affirmed, and this cause is remanded to that court for implementation and execution of the modified judgment.

Judgment affirmed, as modified, and cause remanded.

WHITESIDE, P.J. and BRYANT,J., concur.

REILLY, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Erma Nel DeVault,
Plaintiff-Appellant,

v.

Lewis H. DeVault,
Defendant-Appellee

No. 93AP-720
(Regular Calendar)

OPINION
Rendered on September 23, 1993

Vincent A. Dugan, Jr., for appellant
Brandt & Hull, and Michael t. Brandt, for appellee.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

CLOSE, J.

Plaintiff-appellant, Erma Nel DeVault, appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, wherein the trial court denied sustenance spousal support and denied distribution of the mobile home park, which was specifically found to be a non-marital asset.

The matter has been before this court on two prior occasions. In the original proceeding, the trial court granted the divorce and

awarded each party property titled in their respective names. Neither party was required to pay sustenance spousal support. In addition, the antenuptial agreement, which did not address the divorce, was held to be not applicable to the divorce proceedings. After appeal to this court, the case was remanded for findings of fact and conclusions of law. DeVault v. DeVault (Dec. 20, 1990), Franklin App. No. 90AP-257, unreported (1990 Opinions 5719). The trial court, upon remand, again awarded each party the property titled in their names and awarded no sustenance spousal support. In so doing, however, the trial court specifically found that the antenuptial agreement applied. This court subsequently held that the antenuptial agreement did not apply, and the case was again remanded for further findings of fact and conclusions of law. Devault v. Devault (1992), 80 Ohio App.3d 341. In its third decision, the trial court held that the antenuptial agreement was not applicable; however, it only found one marital asset, three hundred twenty-five shares of Cooker stock. Again, no spousal support was awarded

Appellant appeals, asserting the following assignments of error:

"ASSIGNMENT OF ERROR #1

"THE TRIAL COURT'S DETERMINATION THAT THE MOBILE HOME PARK IS A NON-MARITAL ASSET IS AGAINST THE CLEAR COMMAND OF CASE LAW, STATUTORY LAW, AND THIS COURT'S DIRECTIVE.

"ASSIGNMENT OF ERROR #2

"THE TRIAL COURT ERRED IN FAILING TO AWARD THE

PLAINTIFF-APPELLANT PERMANENT SUSTENANCE SPOUSAL SUPPORT. BASED UPON THE EVIDENCE PRESENTED AND THE CONTROLLING LAW."

In her first assignment of error, appellant alleges that the trial court erred in failing to award a distribution of the mobile home park. The parties were in their early fifties when they married. The marriage lasted fourteen years. Prior to their marriage, Lewis DeVault, defendant-appellee, had purchased a mobile home park for $34,000 and, over a period of time had developed forty-six lots. As of the time of their marriage, this property had a fair market value of $203,400 and a mortgage balance of $130,000. Appellee's equity in the trailer park was, therefore, $73,400 at the date of marriage. During the course of their marriage, twenty-one additional lots were developed through the efforts of both parties. The fair market value at the time of the divorce proceedings was $803,000, and the property had a mortgage balance of $55,000. In this appeal, appellant claims that the trial court backhandedly gave effect to the antenuptial agreement when it held that the entire value of the park constituted a non-marital asset.

Appellant claims a right to this property based on the theory of "transmutation" of the non-marital asset into a marital asset. At a minimum, appellant claims rights to the increased value of the property based on the fact that labor and marital funds were expended on the property during the course of their marriage.

Transmutation has been recognized in Kuehn v. Kuehn (1988), 55 Ohio App.3d 245. The court in Kuehn listed a number of factors to consider in determining whether or not separate

property has converted to marital. We agree that, under certain circumstances, transmutation is possible. The expressed of the parties in one, but only one, of the factors listed in Kuehn. On two occasions, appellant loaned money to appellee for the development and operation of the trailer park. Of significance is the fact that she treated the two transactions as loans and not as an investment or contribution. This clearly negates an intent to treat the entire property as joint property. Both of the loans were, in fact, repaid.

The law is clear, however, that, where significant marital funds or labor are expended to improve and maintain separate property, the court may apportion the appreciation in value as a marital asset. Worthington v. Worthington (1986), 21 Ohio St.3d 73, 76. "'An addition or improvement made by the expenditure of marital funds or as a result of work furnished by either or both parties during the marriage is marital Property ***.'" Palmer v. Palmer (1982), 7 Ohio App.3d 346, 348. [It is noted that this has since been codified in R.C. 5105.171(A)(3)(a)(iii)].

Although evidence of the parties' intent supports a finding that the entire trailer park has not been "transmuted" into marital property, the above case law requires a finding that some portion of the increase in value is a marital asset. Appellee disagrees because appellant allegedly contributed little in the way of funds or labor. Her loans for $10,000 and $14,000 were both repaid, although one was without interest. Apparently, only a negligible portion of their joint checking account was applied to the park's operations. Appellant primarily worked for her family's ice cream

company, although testimony established that she did answer phones, collect rents, lay tile, mow the lawn and show homes on occasion.

The law only requires that one of the spouses furnish work or marital funds. The amount of work performed by appellant is not controlling. Both parties acknowledge that appellee devoted his time to the development and management of the trailer park. The trial court also found that appellee "devoted all of his normal working time to both operating and improving the mobile home park." On this basis alone, some of the increased value of the trailer park must be deemed a marital asset.

Appellee claims, as the trial court held, that much of the increased value was due to the fact that income from the park was reinvested for improvements. Income, however, is a measure of the success of one's labor. That the income was reinvested does not make the improvements and appreciation separate property. Only normal and natural appreciation, which is due to inflation or changes outside the control of the parties, is non-marital property. *Palmer*. It is proper, therefore to exclude only such normal and natural appreciation from the computation of marital property.

The increased value of the trailer park, over and above the normal and natural appreciation, must be treated as a marital asset. This, however, does not deprive the trial court from reconsidering on remand all property issues. This includes allowing setoffs against property appellant has transferred out to her son and daughter. Provision should also be made for the three disputed mobile homes, if they exist.

Appellant's first assignment of error is sustained.

In her second assignment of error, appellant alleges that the trial court erred in denying sustenance spousal support because it did non consider all of the factors in R.C. 3105.18 based on the evidence before it.

Appellant claims that her income will drop in two years from $14,994 to $4,800. She also claims that her progressive arthritis prevents her from performing routine household chores. She is now sixty-nine years of age, and their marriage lasted over fourteen years.

Upon review of the record, we conclude that the trial court did not abuse its discretion. The trial court did consider her health and, in so doing, found it significant that she was still gratuitously babysitting and working in her family's business. In considering age and incomes, the trial court found that neither party was dependent upon the other for support. Appellant's dissipation of some assets was also, justifiably, a significant factor.

Appellant's second assignment of error is overruled.

Appellant's first assignment of error is sustained, and appellant's second assignment of error is overruled. The judgment of the trial court is reversed in part and affirmed in part, and this cause is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed in part,
affirmed in part, and cause remanded.

TYACK and DESHLER, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Erma Nell Devault,

Plaintiff-Appellant, No. 91AP-1089

v. (ACCELERATED CALENDAR)

Lewis H. Devault,

Defendant-Appellee.

OPINION

Rendered on May 28, 1992

Harry Lewis Co., LPA, Harry Lewis and Vincent P. Dugan, for appellant.

Matan & Smith, Eugene L. Matan, for appellee

APPEAL from Franklin County Court of Common Pleas, Division of Domestic Relations.

DESHLER, J.

Plaintiff-appellant, Erma Nell Devault, appeals the trial court decision validating the antenuptial agreement between the parties and denying permanent spousal support.

On November 9, 1974, the parties were married in Columbus, Ohio. Prior to the marriage, the parties entered into an antenuptial agreement. The trial court entered a decree of divorce on

February 27, 1989. Then, on December 20, 1990, this court remanded this case back and ordered the trial court to provide sufficient findings of fact and conclusions of law. Devault v. Devault (Dec. 20, 1990), 90AP-257, unreported, (1990 Opinions 5719). In Devault, this court found that the trial court had failed to provide sufficient explanation of its award of sustenance alimony, its determination of the market value of the mobile home park, and its award of attorney fees. After remand, the trial court rendered a decision on August 26, 1991. That decision is the subject of this appeal.

On appeal, plaintiff- appellant raises four assignments of error:

"1. THE LOWER COURT ERRED IN REFUSING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENT TO DETERMINE WHETHER THERE WAS AN EQUITABLE DIVISION OF MARITAL AND SEPARATE PROPERTY PURSUANT TO OHIO REVISED CODE 3105.171.

"2. THE LOWER COURT ERRED IN REVERSING ITS OWN FINDING THAT THE ANTENUPTIAL AGREEMENT WAS TESTAMENTARY IN NATURE AND DID NOT APPLY TO DIVORCE PROCEEDINGS.

"3. THE LOWER COURT ERRED IN FAILING TO FIND THE MOBILE HOME PARK AS A MARITAL ASSET, DUE TO THE SUBSTANTIAL IMPROVEMENTS MADE

DURING THE FOURTEEN (14) YEAR MARRIAGE FROM THE COMMINGLING OF MARITAL TANGIBLE AND INTANGIBLE ASSETS.

"4. THE LOWER COURT ERRED N FAILING TO AWARD PERMANENT SUSTENANCE SPOUSAL SUPPORT BASED UPON THE FACTS AND EVIDENCE PRESENTED."

We first address the second assignment of error because we find the resolution of this error is dispositive of the case on appeal. By the second assignment of error, appellant contends the court should not have recognized the antenuptial agreement in determining the division of property or spousal support since, appellant alleges, the agreement dealt only with testamentary issues, saying nothing about its applicability to a divorce. Otherwise, appellant does not contend the agreement is invalid. In response, appellee, like appellant, makes no contention that the antenuptial agreement is invalid. However, appellee contends the antenuptial agreement was to apply to either divorce or death.

It is this court's conclusion that the antenuptial agreement, by its terms, clearly specifies and therefore limits the rights appellant gave up by signing the agreement. The agreement included provisions concerning the disposition or devolution of property and payments for sustenance upon the death of one or other of the spouses. In substance, the agreement stated nothing about what would happen upon separation or divorce. The agreement makes provision for release of marital rights only upon death. Whether by

intention or oversight, the agreement of the parties does not specifically call for its application to a divorce proceeding. Therefore, the agreement does not apply to a divorce proceedings at bar.

Accordingly, we sustain appellant's second assignment of error.

Related to the problems surrounding the second assignment of error is the trial court's lack of sufficient findings of fact and conclusions of law. This very issue was addressed in our earlier decision, Devault, supra.

Since we have ruled the antenuptial agreement of the parties does not apply to this divorce proceeding, it follows the trial court's failure to adequately set forth findings of fact and conclusions of law is error. We therefore sustain appellant's first assignment of error.

We are aware that our ruling that antenuptial agreements which fail to mention divorce do not thereby apply t such, runs contrary to the ruling in Nighswander v. Nighswander (Jan. 22, 1990), Seneca County App. No. 13-87-2, unreported. However, we believe that we set forth the better view which is consistent with the statement in Herder v. Herder (1972), 32 Ohio App.2d 75, 76, 77: "*** A court cannot make contracts for others, read into them terms or language not there, nor change the conditions of contracts lawfully made. ***" If a party to an antenuptial agreement wishes to have it apply in the event of a divorce, they should do so by express agreement.

Having found that the antenuptial agreement does not apply to the case sub judice and having consequently sustained appellant's first and second assignments of error, we remand this case to the trial court for consideration of the other issues involving property distribution and spousal support--those matters addressed in appellant's third and fourth assignments of error. They are not yet ripe for determination by this court's admonitions in Devault, supra, so that this case, if again appealed, can be properly reviewed.

For the foregoing reasons, appellant's first and second assignments of error are sustained, the third and fourth assignments of error are overruled, and the matter remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

McCORMAC and BOWMAN, JJ. concur.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

Erma Nel DeVault
Plaintiff

v. CASE NO: 88DR-11-3301

Lewis H. DeVault
Defendant

DECISION

The Trial Court has previously denied the Plaintiff's motion for this Judge to recuse himself from further consideration of this matter.

This matter is now before the Court upon remand from the Court of Appeals wherein the trial court has been requested to make specific findings of fact and conclusions of law to support its judgment.

The Antenuptial Agreement does not specifically contemplate a divorce and therefore clearly did not encourage a divorce and it enabled a marriage to occur which probably would not have otherwise occurred.

While not specifically addressing itself to the issue of divorce, which might be offensive to parties in their fifties each with adult children from their previous marriage, their intent appears clear however from the sixth and seventh "whereas" preambles to their Agreement and from paragraphs 1 and 5 of the formal Agreement

that not only was their separate property independent from one another for all purposes, but also income or profits therefrom which would preclude sustenance alimony to be awarded therefrom.

The concerns of the parties were met in contemplating death which is certain, and being silent as to a specific event (divorce) which did not appear at the time to ever a reality.

Had the parties wished to exclude the contingency of divorce from the disposition of their respective separate property and income therefrom, they could have specifically done so, but instead chose to be silent as to such an offensive word (divorce) and let the general terms of the Agreement spell out their intent.

At the time of the preparation and execution of the Agreement, each of the parties was represented by legal counsel and there was full disclosure of the parties' respective estates, each of which was considered sufficiently substantial that they desired to accommodate their children in the future.

The Antenuptial Agreement was made upon consideration of marriage, entered into in good faith, freely without fraud, duress, or coercion, and was fair and reasonable under the circumstances. Accordingly, this Court holds, as was the basis for the original Decision, that the Antenuptial Agreement is binding upon the parties and should be considered as their valid contract limiting this Court's disposition upon the granting of a divorce.

If a divorce judgment were to consider separate property at the time of marriage, or profit or income therefrom during or after marriage in determining alimony, such divorce judgment would defeat the terms of the Antenuptial Agreement which specifically

provided that such property and income was to be the sole property of each upon death unless gifted to the other prior to death (as occurred in this case) or willed to the other at death.

The record is replete with instances wherein the parties manifested their intent to keep their respective separate property, and profits and income therefrom, as their continuing separate property free from any invasion by the other.

The record also supports the fact that any increase in value of the defendant's mobile home park was due to reinvestment of income therefrom (which the parties spoke to in their Antenuptial Agreement) and normal appreciation, thus being dispositive of any argument that any part of the mobile home par,, albeit with enhanced value during the course of the marriage, was a marital asset to be divided by this court.

As to the issue of sustenance alimony, the Court finds defendant's income to be as follows:

a) his previously earned retirement benefits of approximately $9600.00 per year.

b) social security benefits of $1050.00 per year.

c) income from his separate property, as determined to be his sole property under paragraph 1 of the Antenuptial Agreement.

The Court finds plaintiff's income to be as follows:

a) social security benefits of $3600.00 per year.

b) interest and dividend income of $1200.00 per year.

The plaintiff has arthritis in her hands which limits her earning capacity but she is not disabled from performing duties as an office person in her family's business or babysitting for her daughter,

both of which she performs on a gratis basis.

The Court never considered, and does not now consider, plaintiff's health to be relevant in this Court's ultimate determination of the issue of sustenance alimony (re the Court's initial failure to read the deposition concerning plaintiff's physical condition) since it has considered all the factors enumerated under R.C. 3105.18 and the parties' own Antenuptial Agreement and concluded that no sustenance alimony (including expense money) is warranted in this case.

Based upon the foregoing findings and conclusions, the trial court hereby adopts its prior decision and judgment in this case.

"s/George W. Twyford"
George W. Twyford, Judge

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IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

Erma Nel DeVault
Plaintiff

v. CASE NO: 88DR-11-3301

Lewis H. DeVault
Defendant

DECISION

Divorce is granted to both the Plaintiff and the Defendant on the grounds that the parties have, without interruption, lived separate and apart for one year without cohabitation.

Although this court has previously ruled that the parties' Antenuptial Agreement executed on November 8, 1974 did not specifically contemplate a divorce, the parties, nevertheless during the course of their marriage, operated between themselves and there respective children as if their respective properties were independent of any ultimate control or interest of the other party, notwithstanding any enhanced value during the course of the marriage. Accordingly, the Court awards to each of the parties all property, whether real or personal, tilted in their respective names or under their respective control. This includes an award to Plaintiff of the double mobile home titled in her name, but located on Defendant's real estate at his mobile home park.

Each party shall pay and hold the other harmless on all debts listed solely in their respective names, and the parties shall share equally any joint obligations.

Neither party shall be responsible to pay sustenance alimony to the other.

Both parties shall do all things necessary to give affect to the foregoing.

Each party shall pay their respective expenses incidental to this case.

Effective, January 11, 1990.

"s/George W. Twyford"
George W. Twyford, Judge

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Statement of the Case

[Cite as Fletcher v. Fletcher (1994), —— Ohio St.3d ——.]

Domestic relations—Antenuptial agreement—Burden of proving fraud, duress, coercion or overreaching is on the party challenging agreement—When agreement provides disproportionately less than party challenging it would have received under an equitable distribution, burden is on one claiming validity to show full knowledge or disclosure—Party financially disadvantaged by agreement must have meaningful opportunity to consult with independent counsel.

1. When an antenuptial agreement provides disproportionately less than the party challenging it would have received under an equitable distribution, the burden is on the one claiming the validity of the contract to show that the other party entered into it with the benefit of full knowledge or disclosure of the assets of the proponent. The burden of proving fraud, duress, coercion or overreaching, however, remains with the party challenging the agreement.
2. When an antenuptial agreement provides disproportionately less than the party challenging it would have received under an equitable distribution, the party financially disadvantaged must have a meaningful opportunity to consult with independent counsel.

(No. 92-2117—Submitted October 20, 1993—Decided—March 23, 1994.)

Appeal from the Court of Appeals for Montgomery County, No. 12942.

Appellant, Dyane L. Fletcher ("Dyane"), and appellee, Kenneth W. Fletcher ("Kenneth"), married on April 29, 1983. One day before the wedding, the parties executed a prenuptial agreement. After seven years of marriage, Kenneth filed a complaint for divorce and for enforcement of the prenuptial agreement. Dyane's answer asserted that the agreement was obtained by fraud and duress and was therefore invalid.

Kenneth and Dyane met in 1982, while each was married to another person. In early 1983, they discussed marriage and by April 1983, both had terminated their then current marriages. At that time, Dyane was represented in her dissolution by attorney Paul J. Winterhalter, and he and another attorney from the same law firm, Donald Schweller, represented Kenneth in his divorce. Schweller also drafted the prenuptial agreement that Kenneth and Dyane signed.

At the hearing to determine whether the prenuptial agreement was valid, conflicting testimony was offered about the circumstances of the preparation and execution of the agreement. Kenneth testified that he had discussed the agreement and its contents with Dyane prior to its execution on April 28. Dyane denied there had been any prior discussions. Dyane also denied reading the agreement before she signed it. Attorney Schweller testified that Dyane had appeared to read the agreement before

signing it. Attorney Winterhalter stated that he had explained to Dyane her rights to a divorce when he was representing her in her prior dissolution. Dyane denied this. Dyane testified also that attorney Schweller told her at the signing that, in the event the marriage to Kenneth was terminated, whatever she and Kenneth accumulated together would be "divided." Schweller denied stating this.

The parties agreed on some facts. It was uncontroverted that attorney Schweller told Dyane that she cold have legal counsel and that she declined. It was also agreed that although attorney Schweller in some fashion orally explained the contents of the agreement, he did not fully delineate to Dyane at the April 28 signing exactly what rights would accrue to her from the marriage and how the agreement would affect those rights.

Based on the evidence and legal authority submitted, the trial court upheld the agreement. The court of appeals affirmed except as to the part of the judgment that denied spousal support, which it reversed, and remanded the cause for a determination of support.

The cause is now before this court upon the allowances of a motion to certify the record.

Rogers & Grenberg, Stanley Z. Greenberg and L. Anthony Lush, for appellee.

Crew, Buchanan & Lowe and Charles D. Lowe, for appellant.

Moyer, C. J. It is well settled in Ohio that public policy allows the enforcement of prenuptial agreements. Gross v. Gross (1984), 11

Ohio St.3d 99, 11 OBR 400, 464 n.e.2d 500, paragraph one of the syllabus. "Such agreements are valid and enforceable (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce." Id. at paragraph two of the syllabus. These conditions precedent to the enforcement of a prenuptial agreement arise in part from the fact that parties who have agreed to marry stand in a fiduciary relationship to each other. Id. 11 Ohio St.3d at 108, 11 OBR at 409, 464 N.E.2d at 509; Juhasz v. Juhasz (1938), 134 Ohio St. 257, 12 O.O. 57, 16 N.E.2d 328, paragraph one of the syllabus.

Long before Gross, this court held that prenuptial agreements controlling the distribution of assets upon the death of a spouse may be enforceable. Juhasz, supra; Hook v. Hook (1982), 69 Ohio St.2d 234, 23 O.O.3d 329, 431 N.E.2d 667. In Juhasz, this court held that when a prenuptial agreement provides that one spouse shall receive an amount that is wholly disproportionate to the amount he or she would take under the law, the spouse asserting the validity of the contract bears the burden to show that it was executed after full disclosure of the nature, value and extent of the proponent's property or that there was full knowledge thereof. Id., 134 Ohio St. 257, 12 O.O. 57, 16 N.E.2d 328, paragraph three of the syllabus. Under Juhasz, a prenuptial contract would be enforced upon the death of a spouse if it was voluntarily entered into and if the provision for the surviving spouse was fair and

reasonable under all the circumstances. Id. at paragraph two of the syllabus. If the provision is "wholly disproportionate," the agreement will still be enforced if it was voluntarily entered into with full disclosure or knowledge. Id. at paragraph four of the syllabus.

In determining the enforceability of prenuptial agreements upon separation or divorce, the Gross court refined and elaborated on the Juhasz voluntariness test. The court acknowledged that modern trends in marriage and divorce and changing social attitudes compelled the conclusion that these types of agreements tend to promote marriage, rather than encourage divorce. 11 Ohio St.3d at 105-106, 11 OBR at 406-406, 464 N.E.2d at 505-506. Nevertheless, we forged a three-part test for enforceability, set forth supra, to ensure that the economically superior party, who typically proposes the antenuptial agreement, does not take unfair advantage of his or her prospective spouse.

The first element of the Gross test requires that the agreement be freely entered into without fraud, duress, coercion or overreaching. Those terms were defined according to their generally accepted meanings. Id. 11 Ohio St.3d at 105, 11 OBR at 406, 464 N.E.2d at 506. "Overreaching" was specifically defined as one party outwitting or cheating the other "by artifice or cunning, or by exploiting a significant disparity in understanding the nature of the transaction***." Id. The Gross court applied its newly announced test to the facts before it and held the agreement enforceable. The evidence in Gross was that the wife who challenged the agreement had had benefit of counsel, and that there had been full disclosure of the husband's assets. In a case

decided on the same day, this court held invalid a prenuptial agreement on the basis that there had not been a full disclosure of the proponent's financial worth. Zimmie v. Zimmie (1984), 11 Ohio St.3d 94, 11 OBR 396, 464 N.E.2d 142.

Antenuptial agreements are contracts and generally the law of contracts applies to their interpretation and application. 2 Williston on Contracts (3 Ed.1959), Section 270B. Nevertheless, this court has recognized that these agreements constitute a special type of contract to which certain special rules apply. See Gross, supra. In Juhasz, for example, this court held that an agreement to marry gives rise to a confidential relationship between the parties, and that an antenuptial agreement that creates a disproportionate allocation of property upon death shifts the burden of proving full disclosure onto the party claiming the validity of the contract. This burden shifting is in derogation of traditional contract principles because ordinarily a party asserting the invalidity of a contract bears the burden of proving full disclosure onto the party claiming the validity of the contract. This burden shifting is in derogation of traditional contract principles because ordinarily a party asserting the invalidity of a contract bears the burden of proving a defense to it. See Ohio Loan & Discount Co. v. Tyarks (1962), 173 Ohio St. 564, 20 O.O.2d 168,184 N.E.2d 374, paragraph two of the syllabus.

the first justification for this burden shifting is the fiduciary relationship of the parties. The second justification is that antenuptial agreements negate the statutorily defined presumptive rights of a spouse to an equitable distribution of marital assets

upon divorce. R.C. 3105.171. Thus, paragraph three of the syllabus in Juhasz remains good law and applies to prenuptial agreements made in contemplation of divorce. When an antenuptial agreement provides disproportionately less than the party challenging it would have received under an equitable distribution, the burden is on the one claiming the validity of the contract to show that the other party entered into it with the benefit of full knowledge or disclosure of the assets of the proponent. The burden of proving fraud, duress, coercion or overreaching, however remains with the party challenging the agreement.

This court will not reweigh the evidence introduced in a trial court; rather, we will uphold findings of the trial court when the record contains some competent evidence to sustain the trial court's conclusions. Ross v. Ross (1980), 64 Ohio St.2d 203, 18 O.O.3d 414 N.E.2d 426. In addition, we will indulge all reasonable presumptions consistent with the record in favor of lower court decisions on questions of law. In re Sublett (1959), 169 Ohio St. 19,7 O.O.2d 487, 157 N.E.2d 324. When a trail court, sitting without a jury, determines an issue but does not make separate findings of fact and conclusions of law, a reviewing court will presume the validity of that judgment as long as there is evidence in the record to support it. Scovanner v. Toelke (1928), 119 Ohio St.256, 173 N.E. 493, paragraph four of the syllabus.

On August 27, 1990, the trial court in the instant case rendered its decision upholding the parties' prenuptial agreement. This decision summarized pertinent testimony, but lacked specific findings of fact. This court must therefore establish that the

elements of Gross have been satisfied. Although certain critical facts were in dispute, we must presume that the trial court believed the testimony that supported the enforceability of the agreement.

It is not disputed that there was adequate disclosure of Kenneth's assets. Attached to the antenuptial agreement was a financial disclosure statement, the accuracy of which Dyane does not dispute. Nor does Dyane assert that the agreement tended to promote profiteering by divorce. Thus, the Gross test will operate to invalidate the agreement only if the record contains unrebutted evidence that establishes fraud, duress, coercion or overreaching.

There was evidence in the record to support the conclusion that Dyane knew her rights incident to divorce. Indeed, the trial court wrote, "There is no doubt in this court's mind that Judge Kern [who presided over Dyane's prior dissolution] fully questioned the parties concerning the unequal division and that first [Dyane] understood the same or Judge Kern would not have granted the dissolution." It is agreed that Dyane was given the opportunity t consult with independent counsel, but refused. Although the parties executed the agreement the day before the wedding, the trail court could reasonably have concluded that because of the small size and informality of the impending wedding, it could have been postponed had Dyane wished t consult counsel. Finally, there is some evidence from which t conclude that Dyane read the agreement and understood its contents prior to signing it.

We acknowledge that several of the circumstances of the execution of this agreement militate against its enforceability. The contract never specifically mentioned divorce. At least one Ohio

appellate court has held an antenuptial agreement inapplicable to divorce proceeding because its terms spoke only t to division of assets upon the death of a spouse and not do divorce. Devault v. Devault (1992), 80 Ohio App.3d 341, 609 N.E.2d 214. Nevertheless, the terms of the Fletchers' agreement provide in part, "[e]ach party hereby releases and discharges completely and forever the other from any and all rights of past, present and future support, division of property, *** or any other property rights, benefits or privileges accruing to either party by virtue of said marriage relationship ***." Dyane herself testified that attorney Schweller described the terms of the agreement "[i]n the event that this marriage is terminated***." This evidence is sufficient for the trail court to conclude that the parties intended the agreement to apply to divorce.

In addition, the relationship between attorney Winterhalter, who had represented Dyane in her prior dissolution, and attorney Schweller, who drafted the instant agreement, may have led Dyane to place undue trust in them to protect her interests. If the trial court had completely credited her version of events, it may well have concluded that there was overreaching.

Appellant urges this court to extend the duty that an attorney who drafts an antenuptial agreement owes to a client's unrepresented intended spouse. Appellant urges that the Gross disclosure requirement should encompass not only the assets of the party who is proposing the agreement, but also "the rights that would accrue to the underrepresented party by reason of the marriage and how those rights are affected by the antenuptial

agreement." Appellant quotes the following language from Gross: "The parties must act in good faith, with a high degree of fairness and disclosure of all circumstance which materially bear on the antenuptial agreement." Gross, 11 Ohio St.3d at 108, 11 OBR at 409, 464 N.E.2d at 509. When read in conjunction with the syllabus law of the case, however, the word "circumstances" refers not to legal rights but to assets. Nor do we take so jaundiced a view of the relationship between prospective marriage partners as to require that the financially disadvantaged party be "read his or her rights" in the sense of Crim.R. 11 or Miranda v. Arizona (1966), 384 U.S.436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

The facts of this case, however, lend some weight to appellant's argument of overreaching. The antenuptial agreement was presented to Dyane on the eve of the wedding. Although the trial court apparently found that this circumstance did not constitute coercion, it could reasonable have found otherwise. Our research has disclosed that it is a common practice to present antenuptial agreements at the eleventh hour before the wedding ceremony. See, e.g., In re Marriage of Maton (1985), 41 Wash.App. 660, 705 P.2d 817 (sample agreement first seen one week before wedding and executed on eve of same); In re Marriage of Norris (1981), 51 Or.App. 43, 624 P.2d 636 (first presented and executed on wedding day); Lutgert v. Lutgert (Fla.App.1976), 338 So.2d 1111 (presented and executed on day of wedding); Bauer v. Bauer (1970), 1 Or.App.504 464 P.2d 710 (presented on wedding day). Prenuptial agreements are often drafted in such a way as to be nearly incomprehensible to a layperson. for this reason, we hold

that when an antenuptial agreement provides disproportionately less than the party would have received under an equitable distribution, the party financially disadvantaged must have a meaningful opportunity to consult with counsel. The presentation of an agreement a very short time before the wedding ceremony will create a presumption of overreaching or coercion if, in contract to this case, the postponement of the wedding would cause significant hardship, embarrassment or emotional stress.

Although we retain the Gross test for determining the enforceability of antenuptial agreements, we recognize that assistance of counsel may in some cases be necessary for a fully informed and considered decision to sign. The meaningfulness of the opportunity of the nonproponent party to seek counsel before executing an antenuptial agreement is, therefore, a significant element of the Gross test to determine whether coercion or overreaching occurred. Nevertheless, an agreement signed without counsel is not per se invalid, and mere regret at an unwise decision does not establish duress, coercion, fraud or overreaching.

For the foregoing reasons, we affirm the judgment of the court of appeals.

Judgment affirmed

COURT OF APPEALS
SENECA COUNTY, OHIO
THIRD APPELLATE DISTRICT

GERALD O. NIGHSWANDER,
PLAINTIFF-APPELLEE,

v.

ANITA K. NIGHSWANDER,
DEFENDANT-APPELLANT

CASE NUMBER 13-87-2

O P I N I O N

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.
JUDGMENT: Judgment affirmed.
DATE OF JUDGMENT ENTRY: January 22, 1990.

ATTORNEYS:

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MR. STEVE SHUFF
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For Appellee

EVANS, P.J. This is an appeal from a divorce decree issued by the Court of Common Pleas of Seneca County. Anita Nighswander, appellant, and Gerald Nighswander, appellee, were married on August 20, 1965. Three days prior to their marriage the parties entered into an antenuptial agreement. Essentially this agreement provided that each party would be completely independent of the other as to the property each of them owned at the time of executing the agreement including all property acquired from accumulation arising from such property or property acquired from the proceeds of a sale of any of such property.

In 1985 the appellee filed for divorce. The case was referred to a referee who made the following pertinent findings:

> 5. The parties entered into an antenuptial contract on August 17, 1965, three days prior to their marriage. Defendant claimed this antenuptial contract was rescinded in 1977, however, this allegation is not supported by a preponderance of the evidence.
>
> The Referee finds said antenuptial contract remains in full force and effect. The next determination to be made is the effect this contract has on a property distribution in a divorce case.
>
> Since the enactment of section 3105.63 of the Ohio Revised Code, there has been a

tendency to give effect to antenuptial contracts in divorce cases. These contracts should be given effect no matter how the marriage is terminated, and not merely by death of one of the parties.

Therefore the referee finds the parties' antenuptial contract does restrict the Court in making a division of property and assets between the parties. The Court cannot grant alimony.

"6. With regard to the claim of defendant for sustenance alimony, the Referee finds she has been employed by the U.S. Postal Service for several years, and in the year of 1984, had gross employment earnings of $20,000.00 Since she has only herself to support, her earnings are adequate for that purpose and she is not entitled to an award for sustenance alimony."

The trial court adopted the findings of the referee in their entirety, granted the appellee a divorce, recognized the validity of the antenuptial agreement, but nevertheless, awarded appellant the sum of Twenty Thousand (20,000) Dollars in recognition of her contribution of time, effort and direct financial contributions.

The appellant appeals the decision of the trial court and asserts the following assignments of error.

I. THE TRIAL COURT ERRED IN JUDGING THE PARTIES' ANTENUPTIAL CONTRACT OF AUGUST 17, 1965, TO HAVE APPLICATION TO THEIR DIVORCE ACTION SO AS TO PRECLUDE AN AWARD OF ALIMONY TO DEFENDANT AND SO AS TO EVEN RESTRICT DIVISION OF PROPERTY.

II. THE TRIAL COURT'S FINDING THAT THE PARTIES' ANTENUPTIAL CONTRACT OF AUGUST 17, 1965, WAS NOT RESCINDED IN 1977 IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT ERRED IN FINDING NOTHING WRING WITH THE REFEREE'S REPORT OF DECEMBER 26, 1985 AND ADOPTING IN TOTO SUCH REPORT WHEN IT CONTAINED PATENT 'DOUBLE TALK', THUS ALLOWING THE REFEREE TO BE THE JUDGE.

IV. THE TRIAL COURT ERRED IN ABSOLUTELY DENYING DEFENDANT'S CLAIM FOR ALIMONY.

V. THE TRIAL COURT ERRED IN FAILING TO ASCERTAIN THE REASONABLE OR FAIR MARKET VALUE OF THE PARTIES' PROPERTY, OWNED

SINGLY OR JOINTLY, AND ABUSED ITS DISCRETION IN FAILING TO MAKE AN EQUITABLE DIVISION THEREOF.

VI. THE REFEREE'S REPORT WAS INSUFFICIENT FOR THE TRIAL COURT TO MAKE A FINAL JUDGMENT AS IT DID.

In support of her first assignment of error, appellant asserts that the antenuptial agreement does not mention the word divorce and does not attempt to define the rights of the parties in the event of a divorce. Therefore, appellant argues, the agreement can have no application in the event of a divorce between the parties. We disagree.

The antenuptial agreement provides in part as follows:

"1. That the said parties and each of them the said Gerald Nighswander and Anita Flicker, hereby declare it to be his and her desire that during their marriage each of them shall and shall continue to be completely independent of the other as to the respect of the enjoyment, disposal, encumbrance or disposition of all property whether owned by either of them at the commencement of their marriage or coming to them or any of them as an accrual of property now owned by them hereby agrees with the other in full of [sic] and in consideration of said proposed marriage that so far as is legally possible by their agreements and the provisions of this contract, all property belonging to either of them acquired

> prior to their marriage or acquired as a direct result of accumulation acquired from said property during said marriage or property acquired after said marriage as a result of property sold and reinvested, shall be enjoyed by either of said parties owning the same and shall be subject to his or her disposition as his or her separate property in the same manner as if the same proposed marriage had not taken place, and as if said parties both had continued to remain single."

We find this provision to be a clear and straightforward statement of the intention of the parties. We find no reason that this contract should not be enforced just because the parties decide to part company through divorce rather than death. The mere fact that the agreement does not deal with every question which would be presented in the event of a divorce does not mean that the binding provisions of the agreement, to the extent they apply, should not be enforced in the event of a divorce.

The Supreme Court of Ohio in the case of Gross v. Gross (1984), 11 Ohio St. 3d 99 has held that antenuptial agreements containing provisions for the disposition of property are not contrary to public policy. Furthermore the court has held that such agreements are valid and enforceable (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure of the nature and value of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce. The appellant does not attack the

antenuptial agreement on any of these grounds. We conclude that the agreement is enforceable in the event of a divorce between the parties to the extent that its provisions control any of the issues arising out of the divorce.

The first assignment of error is overruled.

In her second assignment of error, appellant argues that the antenuptial contract of August 17, 1965 was expressly rescinded by a separate writing executed in 1977 when the parties made joint wills and that the trial court's finding otherwise was against the manifest weight of the evidence.

The execution of a will containing terms which grant a party a greater interest in the property of his or her spouse than was provided in a previously executed antenuptial contract does not automatically invalidate the antenuptial contract. Cantor v. Cantor (1959), 15 O.O. 2d 148. A party who seeks to avoid an antenuptial contract must prove that it was rescinded by mutual agreement of the parties by a preponderance of the evidence. See 47 Ohio Jurisprudence 3d (1983) 313, Family Law, Section 811.

In the instant case, three witnesses testified concerning the alleged rescission of the antenuptial contract by a separate writing executed in 1977 contemporaneously with the parties' wills. This document was alleged to have been lost or destroyed. Thomas Spellerburg, appellee's attorney at the time, recalled nothing of the alleged rescission. Appellant testified that the agreement was rescinded, appellee that it was not.

We find the evidence herein to be such that reasonable men might honestly vary in their conclusions as to whether, on the whole record, the evidence demonstrated by a preponderance that the agreement had been rescinded in 1977. Under these circumstances the decision of the trier of facts must be permitted to stand. C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279.

Appellant's second assignment of error is overruled.

Appellant argues in support of her third assignment of error that the referee's report on the one hand found that no alimony could be granted and on the other hand the report granted appellant the sum of Twenty Thousand ($20,000) Dollars. This is the "double talk" to which appellant refers.

We believe a careful examination of the referee's report will reveal it to be consistent in its provisions. In paragraph 5 of the report the referee discusses the antenuptial agreement. The referee concludes that the agreement is to be given effect no matter how the marriage is terminated, that the agreement restricts the court in dividing property and that the court cannot grant alimony. We think it is clear that the referee is talking about the effect of the agreement on the property of the parties which they owned at the time of the marriage or which they acquired during marriage as a result of such ownership. We note the use of the word "restrict" in the report. This suggests the referee's understanding that the antenuptial agreement applied only to premarital property and that property acquired during the marriage by the efforts of the parties and not by virtue of the ownership of

property prior to marriage was available for division by the court. We also think that the statement in paragraph 5 that the court cannot grant alimony is intended to apply to the property covered by the antenuptial agreement.

As to the award of Twenty Thousand ($20,000) Dollars to appellant, we think this is consistent with the other findings in the referee's report and with the evidence. This marriage was of twenty years duration. Both parties worked at various times during this period. There is also evidence that for part of this period, appellant worked as a rural mail carrier with a substantial income while appellee was retired and that during this period appellant provided much of the financial support for the family. We find no error in recognizing appellant's contribution to the marriage with the sum of Twenty Thousand ($20,000) Dollars from the assets accumulated during marriage.

The third assignment of error is overruled.

In the fourth assignment of error appellant is referring to a division of property as alimony as distinguished from sustenance alimony. For the reasons set forth above, the appellant is not entitled to alimony out of the property owned be the appellee prior to marriage. Appellant received an award of alimony in the amount of Twenty Thousand ($20,000) Dollars out of the property accumulated during marriage. We find no abuse of discretion on the part of the trial court in this regard.

The fourth assignment of error is overruled.

We also overrule the fifth assignment of error. The premarital property was subject to the provisions of the antenuptial

agreement. The property accumulated during the marriage was divided by the actions of the parties without court decree, but which the subsequently approved. We find no abuse of discretion on the part of the court in dividing the property between the parties.

Appellant argues in support of her sixth assignment of error that all of the factors contained in R.C. 3105.18 were not addressed in the referee's report. Thus it was error for the trial court to make a final judgment on the referee's report.

Our examination of the referee's report disclosed that there is sufficient information contained therein to permit the court to understand the nature of the case and the circumstances of the parties. Furthermore, to the extent that the referee's report fails to set forth the facts which would permit the trial court to apply R.C. 3105.18, we believe this to be harmless error in view of the fact that much of the property of the parties was not available for division as alimony in view of the antenuptial agreement between the parties.

The sixth assignment of error is overruled.

Having found no error prejudicial to the appellant herein, in any of the particulars assigned and argued, the judgment of the trial court is affirmed.

Judgment affirmed.

SHAW and MILLER, JJ., concur.